

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

WILLIAM BELARDO,

Plaintiff,

-v-

9:22-CV-32

N. WILSEY,

Defendant.

APPEARANCES:

WILLIAM BELARDO
Plaintiff, Pro Se
20-A-0272
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051

HON. LETITIA JAMES
New York State Attorney General
Attorneys for Defendants
The Capitol
Albany, NY 12224

DAVID N. HURD
United States District Judge

OF COUNSEL:

OLIVIA R. COX, ESQ.
Ass't Attorney General

ORDER ON REPORT & RECOMMENDATION

On January 18, 2022, *pro se* plaintiff William Belardo (“plaintiff”), a DOCCS inmate, filed this 42 U.S.C. § 1983 action alleging that defendant Wilsey violated his Eighth Amendment rights to be free from excessive force

while he was incarcerated at Marcy Correctional Facility. Dkt. No. 1. Along with his complaint, plaintiff also sought leave to proceed *in forma pauperis* (“IFP Application”). Dkt. Nos. 2, 3. After rectifying some deficiencies in the threshold filing requirements that apply to incarcerated litigants, Dkt. Nos. 4, 10, plaintiff’s IFP Application was granted, Dkt. No. 15, his amended complaint was accepted for filing, Dkt. No. 25, and defendant Wilsey was directed to respond to plaintiff’s § 1983 claim, Dkt. No. 27.

On December 2, 2022, defendant moved under Federal Rule of Civil Procedure (“Rule”) 56 for summary judgment. Dkt. No. 32. According to defendant, plaintiff had failed to exhaust his available administrative remedies. *Id.* Although the Clerk of the Court sent to plaintiff a formal notice warning him of the consequences of failing to respond to defendant’s filing, Dkt. No. 34, plaintiff has not done so, *see generally* Dkt.

On February 1, 2023, U.S. Magistrate Judge Andrew T. Baxter advised by Report & Recommendation (“R&R”) that defendant’s motion be granted and that plaintiff’s complaint be dismissed. Dkt. No. 35. As Judge Baxter explained, although plaintiff’s operative complaint is a verified¹ pleading, the available record evidence—which has gone uncontroverted thanks to

¹ A verified pleading is tantamount to a declaration. 28 U.S.C. § 1746.

plaintiff's failure to respond—established that plaintiff failed to fully exhaust his available administrative remedies. *Id.*

Plaintiff has not filed objections. The time period in which to do so has expired. *See* Dkt. No. 35. Upon review for clear error, the R&R will be accepted and adopted in all respects. *See* FED. R. CIV. P. 72(b).

Therefore, it is

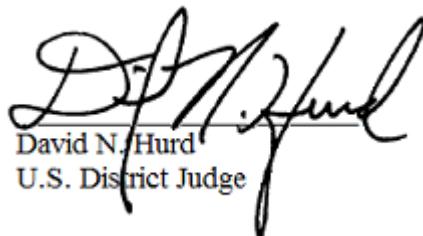
ORDERED that

1. The Report & Recommendation is ACCEPTED;
2. Defendant's motion for summary judgment is GRANTED; and
3. Plaintiff's amended complaint is DISMISSED with prejudice.

The Clerk of the Court is directed to enter a judgment accordingly.

IT IS SO ORDERED.

Dated: February 24, 2023
Utica, New York.



David N. Hurd
U.S. District Judge